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IN THE

Supreme Court of the United States

October Term, 1972
No. 72-690

WILLIAM JOHN HYLAND,

Petitioner,

vs.

PAROLE AND COMMUNITY SERVICES DIVISION, CALIFORNIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals for the Ninth Circuit (App. A of Petition) is unreported. The opinion of the United States District Court for the Central District of California (App. B. of Petition) is also unreported.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

1. Was petitioner an indigent entitled to appointed counsel on his State appeal?

2. Did the courts below apply an improper standard in making their determination that petitioner was not an indigent entitled to counsel?

Statement of the Case

On December 12, 1963, petitioner was convicted in the Los Angeles County Superior Court of three counts of forgery, one count of offering a false document for recording, three counts of grand theft, and one count of issuing a check without sufficient funds. (Record, pp. 88-89, 102-05.) Petitioner was granted extensions of time to file his appeal briefs through February 1, 1966. Immediately thereafter, petitioner filed an affidavit of indigency with the California Court of Appeal in which he requested that counsel be appointed to prosecute his appeal. (Record, p. 39.)

Petitioner's affidavit of indigency was submitted on a form supplied by the California Court of Appeal. In his affidavit he listed his assets as consisting of only $385. (Record, pp. 34-35.) The Court of Appeal in an order dated February 16, 1966, in finding petitioner's affidavit of financial ability insufficient, stated:

> "The Affidavit of Financial Ability, made by appellant William John Hyland on February 14, 1966, does not contain sufficient detailed information to enable the court to determine, under the provisions of section 987 of the Penal Code, whether appellant is unable to employ counsel. It does not appear whether the appellant, who has provided bail on appeal and is not in custody, is employed or has an income. If he is employed,

details regarding his employment should be stated —including the name of his employer and the amount of compensation. If he is not employed, details regarding the manner in which he provides for his subsistence should be stated. Apparently, appellant is outside the State of California. Since he has had experience as a member of the bar, it would seem that he is capable of stating the material information which should be before this court in determining whether counsel for defendant should be appointed at public expense. The appellant should be given an opportunity to file an amended or supplemental affidavit regarding his financial ability.

"IT IS ORDERED that appellant may file an amended or supplemental affidavit regarding his financial ability on or before March 1, 1966." (Record, p. 69.)

On March 2, 1966, petitioner filed a supplemental affidavit in which he stated that in the two year period subsequent to his trial he earned approximately $7,000 and that his current income was uncertain and sporadic. He also indicated that he had "back bills" (notably $30,000 in back taxes and current support obligations for two families.) (Record, pp. 28-32, 109-13.) On March 16, 1966, the California Court of Appeal denied petitioner's application for appointment of counsel on the grounds he failed to supply the court adequate information to enable it to determine if he was financially able to retain counsel. (Record, p. 62.) After an additional extension of time, petitioner failed to file

an opening brief and his appeal was dismissed. (Record, pp. 55-56.)

After exhausting further state remedies through the State Supreme Court, petitioner filed a petition for habeas corpus in the United States District Court, Central District of California. (Record, p. 1.) After all the pleadings were filed and an evidentiary hearing was held, the district court denied the petition for a writ of habeas corpus in an order dated February 19, 1971. (Record, pp. 167-69.) The United States Court of Appeals, for the Ninth Circuit, in affirming the order of the District Court, stated:

> "On the disputed issues of fact the court found against Hyland. We might have reached a different conclusion on the testimony, but we cannot say that the findings were clearly erroneous." (App. A of Petition.)

ARGUMENT

THIS CASE DOES NOT PRESENT A QUESTION APPROPRIATE FOR REVIEW BY THIS COURT

A. The Question Presented Is a Factual Issue Limited to the Instant Case

Although petitioner attempts to depict the issue as whether the appropriate constitutional principles were applied (pp. 7-11 of Petition), this case involves no more than a factual interpretation of the evidence produced in the District Court. This is shown by the following portion of the District Court's ruling:

> "The evidence presented at the hearings before this court consisted of documentary proof of the petitioner's debts in 1966, a letter which detailed the petitioner's income during the period 1964-1968 written by the petitioner to his probation officer in 1968, and the testimony of the petitioner. The documentary evidence substantiates the petitioner's debts in 1966. These included a $28,000 levy by the Internal Revenue Service, $23,000 in unsatisfied judgments, and support obligations for a former wife and child.
>
> "However, a comparison of the affidavits filed in 1966, the letter written by the petitioner in 1968, and his testimony before this court reveals that the petitioner has been—at best—less than candid about the extent of his income and the manner in which he earned it. This court is fully mindful of the claimed tendency to 'puff' in demonstrating earning capacity. The court is equally aware, however, of the tendency to de-emphasize assets and income in establishing indigency. With both tendencies in mind, the court accepts the

petitioner's 1968 account of his earnings and financial ability as the closest approximation of the petitioner's true economic status in March 1966. Accordingly, after thorough consideration of all the evidence, this court is unable to conclude that the petitioner was indigent at that time." (App. B-2 to B-3 of Petition.)

It is well established that certiorari will not be granted merely to review the evidence or inferences to be drawn therefrom. *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 179 (1938). Although petitioner contends that the issue involved is whether the District Court and the Court of Appeals applied the proper legal standards in determining indigency, the ruling of the District Judge that was affirmed by the Court of Appeals, does not support his position in that it shows that the District Judge considered all factors in that he stated he considered petitioner's financial ability to employ counsel. (App. A and B-3 of Petition.) Moreover, in making his determination, the judge expressly noted the indebtedness of petitioner. (App. B-2 to B-3 of Petition.) Furthermore, since petitioner did not file a sufficient affidavit of indigency to enable the California Court of Appeal to determine the issue of indigency, this is not a proper case for this Court to determine whether the appropriate standards were employed. *Cf. DeBacker v. Brainard*, 396 U.S. 28, 32 (1969).

Finally, since the issue is factual and due to the fact both the District Court and the Court of Appeals agreed that the facts did not support a finding of indigency, it is submitted that this Court should not overrule that finding. *Neil v. Biggers*, ... U.S. ...., 93 S.Ct. 378, 379 n. 3, (1972).

B. There Is No Conflict in the Decisions of the Federal Courts

Petitioner cites *Anaya v. Baker*, 427 F.2d 73, 74-75 (10th Cir., 1970), to support his contention that there is a conflict in the decisions of the Ninth Circuit and the Tenth Circuit. He argues that in the *Anaya* case, the Tenth Circuit recognized that the issue of indigency must be reviewed as a question of law whereas the Ninth Circuit in the instant case reviewed the District Court's conclusion of non-indigency solely as one of fact. (Petn., p. 12.) However, it is submitted the *Anaya* case does not support his contention as the *Anaya* case held only that the District Court improperly ruled that before a defendant is entitled to appointed counsel he must be a pauper. The *Anaya* case held that the question was whether the defendant could afford to obtain adequate representation. There is nothing in the instant case to indicate that the District Court Judge did not apply the standards deemed acceptable to the Court of Appeals in the *Anaya* case. In fact the record of the habeas corpus proceedings in the District Court shows that the District Judge determined not that petitioner had to be a pauper before he was entitled to counsel but rather determined that petitioner was able to afford the services of counsel. [Rep. Tr. p. 58.][1] Of course, it follows that in making that determination the judge is basically confronted with a factual question and hence the Court of Appeals decision, which in essence said it was a factual decision, did not conflict with the decision in the *Anaya* case but applied the standards set forth in that case. Hence, there is no conflict in the decisions of the Court of Appeals.

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[1]Rep. Tr. refers to Reporter's Transcript of evidentiary hearing in Federal District Court.

C. The District Court Did Not Erroneously Rule That Petitioner Was Not an Indigent and Hence Was Not Entitled to Appointed Counsel

Petitioner further contends that he was an indigent as a matter of constitutional law. (P. 11 of Petition.) Respondent submits that because of the evidence of petitioner's large, steady income, the District Court Judge properly ruled that the California Court of Appeal did not erroneously hold that petitioner was not an indigent entitled to counsel on his appeal.

The standard to be employed in determining whether a defendant in a criminal case is an indigent entitled to counsel is whether he has the means to employ counsel who will afford him adequate representation. *Anaya v. Baker*, 427 F.2d 73, 74-75 (10th Cir. 1970). Moreover, unless the facts show that the District Court Judge's ruling was clearly erroneous, his decision will not be reversed. *Harris v. Beto*, 438 F.2d 116, 117 (5th Cir. 1971); *Chapa v. Beto*, 428 F.2d 1215, 1216 (5th Cir. 1970); *Heath v. Wainright*, 408 F.2d 1020, 1021 (5th Cir. 1969); *Knowles v. Gladden*, 378 F.2d 761, 766-67 (9th Cir. 1967).

In the instant case, petitioner wrote to his probation officer informing him that at the time he submitted his affidavit of indigency to the California Court of Appeal, he was earning $1200 per month plus a bonus. Moreover, between the period subsequent to petitioner's trial and his affidavit of indigency, he earned approximately $25,000 plus a bonus. (Record, p. 148.) It is submitted that the income was more than sufficient to enable petitioner to obtain adequate representation. *See, Glenn v. United States*, 303 F.2d 536, 542 (5th Cir. 1962) wherein the Court of Appeals held that a

defendant whose income was $110 per week was financially able to employ counsel. Although there were conflicts in the evidence as to petitioner's financial ability to employ counsel (App. B-3 of Petition), the decision as to which are the true facts, unless clearly erroneous, is left to the trier of facts. *Bowland v. Tinsley*, 268 F.2d 666 (10th Cir. 1959).

Conclusion

For the foregoing reasons, respondent urges that this petition for certiorari be denied.

Respectfully submitted,

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